CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 260

DIXIE OHIO EXPRESS COMPANY, APPELLANT,

vs.

STATE REVENUE COMMISSION OF GEORGIA ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

FILED AUGUST 8, 1938.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 16, 1938.

—8512

[fol. 1] **IN SUPERIOR COURT OF FULTON COUNTY**

Execution—Filed August 23, 1937

To All and Singular, the Sheriffs and Constables of this State, Greeting:

You are hereby commanded, That of the goods and chattels, lands and tenements of Dixie-Ohio Express Company, a corporation, you cause to be made by levy and sale sufficient thereof to make the sum of sixty-seven dollars and fifty cents ($67.50), being the amount of principal tax, and penalty, found and adjudged by the State Revenue Commission, and the director of the motor vehicle division of said State Revenue Commission to be due by the said Dixie-Ohio Express Company as maintenance tax for the period of time beginning April 1, 1937, and ending December 31, 1937, for the operation on and over the public roads of said State of Georgia a certain truck or motor vehicle for the transportation of property for hire and more particularly described as follows:

One truck manufactured by International Motor Company, van type body with pneumatic tires serial number —, motor number FAB. 38243, and manufacturer's rated capacity two tons; the said truck being owned and operated by the said Dixie-Ohio Express Company agents and representatives. The said tax is levied by virtue of and pursuant to that act of the General Assembly of Georgia approved March 30, 1937 (Georgia Laws 1937, pp. 155 to 167) generally known as the "Maintenance Tax Act." The principal of said tax is $56.25 and the penalty is $11.25 and is levied for failure to pay said tax when the same became due.

You will also make or cause to be made the sum of fifty [fol. 2] cents for this fi. fa. together with interest at the rate of 7% per annum from and after the 15th day of July, 1937, and have the said several sums to be paid the State Revenue Commission on collection thereof to be rendered the State of Georgia, the principal, penalty, interest and cost aforesaid and have you then and there this writ.

Witness the Honorable J. B. Jones, Chairman, State Revenue Commission, and given under the hand and official

signatures of the State Revenue Commission, and of each member thereof, this the 21st day of August, A. D. 1937.

State Revenue Commission, by J. B. Jones, Chairman; by W. B. Harrison, Vice-Chairman; by T. Grady Head, Commissioner; Marcus P. McWhorter, Director Motor Vehicle Division of State Revenue Commission.

[File endorsement omitted.]

[fol. 3] SHERIFF'S RETURN

GEORGIA,
Fulton County:

I have this day executed the within execution by levying upon the following described property to wit:

One International Automobile Truck, Motor No. FAB 38243. Levied on as the property of Dixie-Ohio Express Company to satisfy an execution issued by the State of Georgia in favor of State Revenue Commission, for maintenance tax beginning April 1, 1937, and ending December 31, 1937, vs. the said Dixie-Ohio Express Company. Property pointed out by plaintiff's attorney. Tenant in possession notified.

This August 21, 1937.

R. E. Warwick, Deputy Sheriff Fulton County.

[fol. 4] IN SUPERIOR COURT OF FULTON COUNTY

STATE REVENUE COMMISSION

versus

DIXIE-OHIO EXPRESS COMPANY

Execution for $56.25 principal and $11.25 penalty, issued by the State Revenue Commission acting under authority of an act of the Legislature approved March 30, 1937, which act provides for the levy of a maintenance tax on the owners of trucks operating over the roads of Georgia.

AFFIDAVIT OF ILLEGALITY—Filed August 23, 1937

GEORGIA,
Fulton County:

Personally appeared before the undersigned officer, duly authorized to administer oaths, Allan Watkins, who, after being duly sworn, deposes and says that he is attorney-in-fact for the defendant in fi. fa., Dixie-Ohio Express Company, and that he has been authorized to execute this affidavit of illegality. Affiant further states that Dixie Ohio Express Company is the defendant in fi. fa. in the above stated case and that the execution therein has been levied by James I. Lowry, sheriff of Fulton County, on certain property described as follows:

A 2-ton International truck, van type body, Motor No. FAB 38243, with pneumatic tires.

That the above described property is owned by Dixie Ohio Express Company and that the said execution did issue illegally and is proceeding illegally against the defendant in fi. fa. for the following reasons, to wit:

1

The execution as issued and levied is proceeding illegally against the property of defendant in fi. fa. for the reason that the act of the legislature approved March 30, 1937, and known as the Maintenance Tax Act, under which act the execution is issued, is invalid as applied to the Dixie Ohio [fol. 5] Express Company because the provisions of said act violate article I, paragraphs II and III of the Constitution of Georgia and in addition violates article 1, section 8, paragraph 3 of the Constitution of the United States and also section I of the fourteenth amendment to the Constitution of the United States.

2

The defendant Dixie Ohio Express Company is a corporation organized under the laws of Ohio with its principal office and place of business in Akron, Ohio. Defendant is engaged solely in the transportation business by motor vehicle as a common carrier of commodities general. Defendant operates its motor vehicles into and through the States of Ohio, Kentucky, Tennessee, Georgia, Alabama,

Pennsylvania and New York. The defendant's transportation business in Georgia and in all the other States is entirely interstate and defendant does no intrastate transportation business whatsoever. Defendant has complied with all the State laws and regulations with the exception of the law challenged herein. The defendant operates under a certificate of convenience and necessity issued by the Interstate Commerce Commission and has complied with all the provisions of the Federal Motor Carrier Act of 1935.

3

All of the operations of the defendant in Georgia are entirely interstate. Defendant hauls commodities from Akron, Ohio, to various points in Georgia and picks up freight in Georgia bound for destinations in States north of Georgia. A description of the routes traveled in Georgia will be more particularly set out hereinafter. The truck levied on in this suit brought a load of freight from Akron, Ohio, to Atlanta, Georgia, and operated over the highways of the States of Ohio, Kentucky, Tennessee, and Georgia. [fol. 6] This truck has made several trips into the State of Georgia since January 1, 1937, and also since the effective date of the maintenance tax act of 1937.

4

Under the Maintenance Tax Act approved March 30, 1937 (Georgia Laws, 1937, page 155) the legislature classified private carrier in one group and contract or common carriers in another group, and placed a graduated tax on each type vehicle based on what is terms manufacturer's rated capacity. Some of the taxes are as follows:

Manufacturer's Rated Capacity	Private Carrier	Contract or Common Carrier
1 Ton or less	$5.00	$10.00
1 Ton	$10.00	$20.00
1½ Ton	$15.00	$50.00
2 Ton	$30.00	$75.00
2½ Ton	$37.50	$100.00
3 Ton	$45.00	$125.00
7 Ton	$1125.00	$1250.00

Tags must also be purchased for trailers and the fee for them is graduated according to empty factory weight.

Neither tractors nor trailers pay fees on the basis of actual weight.

5

Manufacturers rated capacity has no relationship to the actual weight of the vehicle and therefore there is no relationship between the rated capacity of such vehicle and the amount of wear and tear that each vehicle will cause to the highways by its use thereof. The truck of a rated capacity of one ton may weight far in excess of a truck [fol. 7] with a rated capacity of two or three tons. A truck of rated capacity of one ton may have a carrying capacity of five tons. Rated capacity depotes the power of the motor and not the weight or carrying capacity of the body of the truck. A one and one-half ton tractor weighs far less than a one and one-half ton straight truck. A trailer must also purchase a tag, the price on which is based on empty factory weight. A one-and-one-half tractor and a 4000 pound trailer must pay twice or three times the fee of a one and one-half ton straight truck and the straight truck causes more damage to the highway because of the concentration of weight. Neither rated capacity nor factory weight has any relationship to actual weight or carrying capacity of the vehicle and such fees are unreasonable charges for the use the defendant makes of the highways of Georgia.

6

Under the maintenance tax act of 1937 the tax for private trucks is much less than the tax for trucks engaged in contracts hauling or operated as common carriers. In addition, the graduated increase for private trucks is out of proportion with the graduated increase on contract or common carriers. There are 69,503 private trucks operated over the highways of Georgia and there are only 2943 trucks operated over the highways of Georgia as contract or common carriers. Trucks operated as private carriers operate more miles per year over the highways of Georgia than the common carriers or the contract carriers operate over the highways of Georgia. No distinction is made as to carriers engaged in interstate or intrastate commerce, whether common, contract or private. Resident and non-resident carriers are equally taxed and licensed whether they make one trip or one thousand trips. The tax act herein attacked discriminates in favor of private carriers

and against contract and common carriers in violation [fol. 8] of article I, section II of the Constitution of Georgia and also of the commerce clause of the Fourteenth Amendment to the Constitution of the United States.

7

The execution and levy herein under the Maintenance Tax Act of 1937 are for the purpose of collecting a tax alleged to be due for a 1936 International, straight van truck, with a manufacturers rated capacity of two tons. An eventual condemnation bond of $100.00 is tendered to the sheriff making the levy along with this affidavit of illegality under the provisions of Code section 92-7301 of the 1933 Code of Georgia.

8

Dixie Ohio Express Company operates approximately one hundred trucks which come in and out of the State of Georgia at various intervals, travelling between Georgia and Ohio and New York. Because of the inconvenience of making the levy on each and every truck of the defendant, an agreement was entered into whereby the State Revenue Commission has allowed the defendant to deposit in escrow the amount of money alleged to be due on each vehicle under the Maintenance Tax law of 1937 and has agreed that levy should be made against only one truck and the remaining trucks upon which a deposit has been made or will be made would be included in the case herein. Deposits are made as the trucks come into the State of Georgia. The State Revenue Commission further agreed with the defendant that the present case, in which there is an actual levy, shall govern all the other cases in which deposit has been made. Under these circumstances the entire operations of the defendant in fi. fa. are to be considered in this case.

9

The particular truck levied on and all the other trucks [fol. 9] owned by Dixie Ohio Express Company and operated in the State of Georgia have purchased a $3.00 Georgia license plate as required by Code section 68-211 of the 1933 Code as amended by the Legislature in 1935 (Georgia Acts, 1935, page 157). Under the provisions of the laws of Georgia the funds derived from the sale of these $3.00 license fees are placed in the State treasury, to be used by the High-

way Department for the purpose of constructing and maintaining the State Highway System and State Aid Roads after the expenses of the Revenue Commission have been first deducted. The State Revenue Commission collected $1,305,999.71 from the sale of $3.00 license plates during the year 1936. $1,209,495.05 of this fund was allocated to the State Highway fund. The remainder was used to pay the expenses of the Revenue Commission and sheriff's fees.

10

The particular truck levied on herein and all the other trucks operated by Dixie Ohio Express Company in Georgia have registered with the Georgia Public Service Commission and obtained permission to operate in the State of Georgia as an interstate common carrier and have purchased Georgia Public Service carrier plates. The fee required is $25.00 for each truck and is due annually on or before January 1. Defendant in fi. fa. has purchased approximately one hundred of these plates for the year 1937. Under the provision of the Georgia law the expenses of the Georgia Public Service Commission and its employees are to be paid out of the fund received from the sale of these $25.00 carrier plates and any amount over and above the expenses so paid is under the law required to be paid to the State Highway Department for the construction and maintenance of the State Highway System or State Aid roads. The Georgia Public Service Commission collected $73,565 [fol. 10] in 1936 as registration fees under the motor common carrier act of 1931 (Section 68-623, Georgia Code, 1933), which act requires each common or contract carrier to purchase a $25 carrier plate each year. Private carriers are not required to pay this fee. Of the amount collected in 1936 $28,341.12 was paid over to the Highway fund.

11

Under the motor carrier act and the motor common carrier act of 1933 only carriers engaged in intrastate commerce are required to obtain a certificate of public convenience and necessity and the carriers engaged exclusively in interstate commerce are required only to register, pay the $25.00 annual fee per truck, and file the required insurance policies. The Georgia Public Service Commission has no power to regulate rates or routes of interstate car-

riers. Little or no regulatory supervision is required with respect to carriers engaged exclusively in interstate commerce. Interstate and intrastate common or contract carriers pay the annual $25.00 registration fee, part of which is to defray expenses of the Commission and the remainder for highway maintenance.

12

Under the Motor Fuel Tax Law as amended by the 1937 legislature, a tax of six cents per gallon is levied on each gallon of gasoline sold in the State of Georgia. The user is the taxpayer. Of this six cents four cents per gallon is required by statute to be set aside for a State Highway fund to be used for the construction and maintenance of the State Highway System of roads or State Aid roads. The defendant in fi. fa. purchases more than 90,000 gallons of gasoline in the State per year and therefore pays $5,400.00 in gasoline taxes to the State of Georgia out of which $3,600 go directly to the maintenance of State Aid highways over [fol. 11] which defendant's trucks travel. The total gasoline tax paid to the State for the year 1936 by all motor vehicles was $17,525,616.25 and of this sum $11,255,805.68 was remitted to the Highway Department.

13

The defendant in fi. fa. owns approximately one hundred pieces of truck equipment, including one-half ton, two-ton straight trucks, one and one-half and two-ton tractors, that are used to pull trailers weighing approximately 4,000 pounds. At the present time something over $3,000.00 has been deposited under the agreement with the Revenue Commission and probably that sum will exceed $4,000.00 before January 1, 1938. For the year 1938 and each year thereafter the full amount of tax will be collectible before February 1 and it will cost the defendant approximately $6,000.00 yearly. The act provides that only three-fourths of the tax should be payable for the year 1937.

14

Defendant travels through seven States and the general average of miles traveled by its trucks throughout its entire operations is 6,870,000 miles per year. The yearly average miles traveled in Georgia is 725,000. The greater

number of miles traveled in Georgia consists of trips from the Georgia-Tennessee line near Chattanooga, Tennessee, to Atlanta, Georgia, and return. This trip is made entirely over highways included in the State highway system or known as State aid highways from the Tennessee line to Atlanta, Georgia, via Dalton, Calhoun, Cartersville and Marietta. Other highways traveled by the defendant are shown in Exhibit A attached hereto and made a part of this paragraph of this petition. All of the Georgia highways over which the trucks of the defendant travel are State aid highways and are a part of the State Highway System. Less [fol. 12] than eleven per cent of the entire mileage traveled by Dixie Ohio Express Company is traveled in the State of Georgia. Georgia collects far more than eleven per cent of the entire taxes paid to all the seven States through which the defendant operates. If the other six States through which the defendant operates collected the same amount of taxes as is levied by Georgia, including the maintenance tax, this defendant could not operate as its taxes and expenses would greatly exceed its gross revenue. The defendant is not complaining of the $25.00 Public Service Commission fee, the gasoline tax, or the $3.00 license fee, but when the enormous maintenance taxes are added to the sum exacted for those fees the entire taxes paid become prohibitive.

15

That because of the nature and fluctuation of the defendant's business, there are trucks that enter the State for only one trip and under requirements of the Maintenance Tax Act of 1937, these trucks would be required to buy a maintenance tag. In addition, if a tag has been purchased by the defendant for a truck and this truck is sold or destroyed the tag is non-transferrable and the tax is paid for a vehicle that can not use the highway. An average of 25 trucks is sold or destroyed each year. Such regulations show that the primary purpose of the act is to tax this defendant and not to obtain a fee commensurate with its use of the highway.

16

The Georgia Maintenance Tax Act approved March 30, 1937, and effective April 1, 1937, allocates all the money received from the sale of the tags to the United States Rural Post Roads of Georgia and such funds are "to be expended

through the director thereof and the said money shall be pro rated among the several counties of this State accord-
[fol. 13] ing to the number of miles of rural post roads in said counties." The defendant operates through counties which have little or practically no United States Rural Post Roads in them and in addition this defendant does not operate its trucks on any of the rural post roads. As a result, defendant is taxed for the purpose of building highways which it does not and can not use as defendant's operations are now limited by its I. C. C. permit over the highways that it traveled on or before June 1, 1935.

17

United States Rural Post Roads are defined by an act approved March 18, 1937, and effective upon approval. Section 8 of said act defines rural post roads as follows:

"The term Rural Post Roads shall mean all roads and highways in the several counties of the State of Georgia over which the U. S. mail is carried not included in the present highway system. The term farm to market roads in this act shall mean all public roads and highways in the several counties of the State of Georgia other than U. S. Post Roads and/or State Aid Roads."

18

This defendant pays to the State of Georgia each year approximately $300.00 for the State $3.00 license plate, $2500.00 for the $25.00 Public Service Commission carrier plate, $5,400.00 in gasoline taxes and the funds are used to defray expenses of regulation and to maintain the State Highway System. In addition to this, the Federal Government contributed $5,343,711.28 in 1935 and $3,721,489.90 in 1936 for improvement and construction of Georgia roads. These Federal funds and the other motor vehicle taxes are used to construct highways over which defendant operates. The maintenance tax funds are allocated to roads over which defendant never travels.

[fol. 14] 19

In 1936 the total taxes collected by the State of Georgia amounted to $30,058,092.68. The motor vehicles operated in the State paid $19,207,909.59 in license and motor fuel

taxes. The motor vehicles paid over sixty-two per cent. of the entire taxes collected by the State.

20

Said maintenance tax act effective April 1, 1937, is unconstitutional and void in the following particulars, to-wit:

(a) Said tax discriminates against common and contract carriers in favor of private carriers and the tax is so exhorbitant as to be confiscatory and as such is in violation of article I, paragraphs II and III of the Constitution of Georgia, which read:

"Protection to person and property is the paramount duty of government, and shall be impartial and complete.

"No person shall be deprived of life, liberty, or property, except by due process of law."

(b) Said tax is an unreasonable fee exacted for the use defendant makes of the highways and therefore is a direct burden on interstate commerce and in addition it is a tax on the privilege of doing an interstate transportation business and as such is in violation of article I, section 8, paragraph 3 of the Constitution of the United States, which provides: "The Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes."

(c) Said tax is so far in excess of what is a reasonable fee for the use of the highway by this defendant that the same is confiscatory and as such is in violation of the due process clause of section 1 of the Fourteenth Amendment to the United States Constitution, reading: "No State shall make or enforce any law which shall abridge the privilege [fol. 15] or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within his jurisdiction the equal protection of the laws."

(d) Said tax lays an unequal burden on common carriers and discriminates against common carriers in favor of private carriers in that the maintenance tax is less for private carriers than for common carriers and for this reason the tax violates the equal protection clause of section 1 of the Fourteenth Amendment to the Constitution of the United States.

(e) Said tax is a tax for the use of the highways by the defendant who is engaged exclusively in interstate commerce and as it lays a difference tax on trucks of private carriers engaged in interstate commerce than upon identical trucks of the defendant common carrier said tax discriminates in favor of private carriers against common carriers and a burden on interstate commerce in violation of the commerce clause of the Constitution of the United States.

Wherefore, the defendant in fi. fa. prays that this its illegality to said execution be sustained, that said execution be declared null and void and that all levies and other acts under the maintenance tax act of 1937 be annulled.

Dixie Ohio Express Company, by Allen Watkins, Attorney-in-fact for said Corporation. Watkins, Grant & Watkins, Attorneys for Dixie Ohio Express Co.

[fol. 16] Sworn to and subscribed before me this 21st day of August, 1937. Lucille H. Printup, Notary Public, Georgia, State at Large. (N. P. Seal.)

[fol. 17] EXHIBIT "A" TO AFFIDAVIT OF ILLEGALITY

From the Georgia-Tennessee line near Chattanooga to Ringgold, Dalton, Calhoun, Cartersville, Atlanta, Newnan, Hogansville, LaGrange and West Point via Georgia Highways No. 3, No. 14.

From the Georgia-Tennessee line over routes described above to Atlanta, Jonesboro, Griffin, Barnesville, Forsyth and Macon via Georgia Highways No. 3, No. 7, No. 19.

From the Georgia-Tennessee line over routes described above to McDonough, Jackson, Forsyth, Macon via Georgia Highways No. 3, No. 42, No. 19.

From the Georgia-Tennessee line to Atlanta over routes described above to Griffin, Zebulon, Thomaston, Americus, Albany, via Georgia Highway No. 3.

From the Georgia-Tennessee line to Atlanta over routes described *about* to Newnan, Greenville, Chipley, Columbus via Georgia Highways No. 3, No. 14, No. 41, No. 18, No. 1.

From the Georgia-Tennessee line over routes described above to Newnan, Greenville, Warm Springs and Manchester via Georgia Highways No. 3, No. 14, No. 41.

From the Georgia-Alabama line to Atlanta via Bremen, Villa Rica, Douglasville, Austell, via Georgia Highway No. 8.

From the Georgia-Alabama line over Georgia Highway No. 6 to Cedartown, Rockmart, then over Georgia Highway No. 113 to Cartersville, Georgia Highway No. 3 to Georgia-Tennessee line.

From Georgia-Alabama line over Georgia Highway No. 6 to Cedartown, Georgia Highway No. 1 to Rome, Georgia Highway No. 53 to Calhoun and Georgia Highway No. 3 to Georgia-Tennessee line.

Georgia-Alabama line over Georgia Highway No. 8 to Bremen, Atlanta, Lawrenceville, Winder, Athens, then over Georgia Highway No. 10 to Lexington, Washington, Thom-
[fol. 18] son, Augusta.

Georgia-Tennessee line to Atlanta over routes described above to Avondale, Conyers, and Covington via Georgia Highways No. 3, No. 12.

Georgia-Alabama line to Georgia-Tennessee line via Trenton over Georgia Highway No. 58.

Atlanta, Georgia, to Austell to Dallas to Rockmart to Cedartown to Rome to Calhoun to Georgia-Tennessee line via Georgia Highways No. 8, No. 6, No. 1, No. 53, No. 3 (or from Rome to Georgia-Tennessee line via Georgia Highway No. 1).

All of the highways above are part of the Georgia Highway System of State roads and are State aid roads. A major portion of the funds given to the State by the Federal Government has been used to construct and maintain these roads.

[File endorsement omitted.]

[fol. 19] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER TO AFFIDAVIT OF ILLEGALITY—Filed August 31, 1937

Come now the State Revenue Commission and J. B. Jones, W. B. Harrison and T. Grady Head, the members thereof, and Marcus P. McWhorter, Director of the Motor

Vehicle Division of said Commission, plaintiff in fi. fa. in the above stated case and before filing a traverse therein demur to the affidavit of illegality filed by the defendant in fi. fa. on the grounds following, to-wit:

1

Said affidavit as filed by the defendant in fi. fa. sets out no valid or legal cause of illegality to the execution issued and levied, and sets out no such facts as constituted a legal defense thereto or show that said fi. fa. is proceeding illegally. The allegations of said affidavit are wholly insufficient to show, either, that said fi. fa. did issue illegally, or that the same is proceeding illegally.

2

The allegations of fact as set out in said affidavit of illegality do not support or justify the legal conclusions asserted therein and are wholly insufficient to authorize or justify the relief prayed for.

3

Plaintiff in fi. fa. specially demurs to and moves to strike the first paragraph of the illegality on the ground that the allegations therein made set forth conclusions of law only unsupported by any facts alleged in said paragraph or else-
[fol. 20] where in said affidavit.

4

Plaintiff in fi. fa. demurs to and moves to strike the second paragraph of the affidavit of illegality on the ground that the facts therein alleged, if true, are irrelevant and immaterial and do not, whether taken alone or in connection with other allegations of fact in said affidavit legally justify a holding that the fi. fa. in question did issue illegally or that the same is proceeding illegally.

5

Plaintiff in fi. fa. specially demurs to and moves to strike the fifth paragraph of the affidavit of illegality on the grounds following, to wit:

A. The facts in said paragraph set out, if true, are irrelevant and immaterial, and do not, whether taken alone of

in connection with other allegations of the affidavit legally justify a holding by the court that the fi. fa. in question did issue illegally or is proceeding illegally.

B. Plaintiff specially demurs to and moves to strike from said paragraph the first sentence thereof reading as follows:

"Manufacturer's rated capacity has no relationship to the actual weight of the vehicle and therefore there is no relationship between the rated capacity of such vehicle and the amount of wear and tear that each vehicle will cause to the highway by its use thereof,"

on the ground that said allegation sets out a conclusion contrary to matters of common knowledge and of which the Court will take judicial cognizance.

C. Plaintiff demurs to and moves to strike the second sentence of the fifth paragraph of said affidavit of illegality reading as follows: "A truck of a rated capacity of one ton may weigh far in excess of a truck with a rated capacity [fol. 21] of two or three tons," on the ground that such allegation, if true, is irrelevant and immaterial and does not whether taken alone or in connection with other allegations of fact set out in the affidavit justify the holding that the fi. fa. in question did issue illegally or is proceeding illegally.

D. Plaintiff demurs to and moves to strike the following sentence in said paragraph 5 reading as follows, to-wit: "A one and one-half ton tractor weighs far less than a one and one-half ton straight truck. A trailer must also purchase a tag the price of which is based on empty factory weight. A one and one-half ton tractor and a 4,000 lb. trailer must pay twice or three times the fees of a one and one-half ton straight truck and the straight truck causes more damage to the highway because of the concentration of weight," on the ground that said allegations, if true, are irrelevant and immaterial and do not, whether taken alone or in connection with other allegations of the affidavit, justify a holding that the fi. fa. in question did issue illegally or is proceeding illegally.

E. Plaintiff specially demurs to and moves to strike that portion of the last sentence of said fifth paragraph of the

affidavit reading as follows: "Neither rated capacity nor factory weight has any relationship to actual weight or carrying capacity of the vehicle," on the ground that said allegation sets out a conclusion contrary to what is a matter of common knowledge of which the Court will take judicial cognizance.

F. Plaintiff specially demurs to that part of the last sentence of said fifth paragraph of the affidavit reading as follows: "Such fees are unreasonable charges for the use the defendant makes of the highways of Georgia," on the ground that said allegation sets forth a conclusion unsupported by allegations of fact.

[fol. 22] 6

Plaintiff specially demurs to certain portions of the sixth paragraph of the affidavit on the grounds as hereinafter set out, to wit:

A. Plaintiff demurs to and moves to strike the first sentence of said paragraph reading as follows: "Under the maintenance tax act of 1937 the tax for private trucks is much less than the tax for trucks engaged in contract hauling or operated as common carriers," on the ground that said allegation sets forth a conclusion of the pleader only and besides the allegation as made, if true, is irrelevant and immaterial and does not justify a holding that the execution in question did issue illegally or in proceeding illegally, whether taken alone or in connection with other allegations.

B. Plaintiff demurs to the second sentence of said paragraph reading as follows: "In addition, the graduated increase for private trucks is out of proportion with the graduated increase on contract or common carriers," on the ground that said allegation sets forth a conclusion of the pleader only and if true is irrelevant and immaterial and does not justify a holding that said fi. fa. did issue illegally or is proceeding illegally.

C. Plaintiff demurs to and moves to strike that portion of the sixth paragraph of the affidavit reading as follows: "There are 69,503 private trucks operated over the highways of Georgia and there are only 2943 trucks operated over the highways of Georgia as contract or common car-

riers. Trucks operated as private carriers operate more miles per year over the highways of Georgia than the common carriers or the contract carriers operate over the highways of Georgia. No distinction is made as to carriers engaged in interstate or intrastate commerce, whether com-
[fol. 23] mon, contract, or private. Resident and non-resident carriers are equally taxed and licensed whether they make one trip or one thousand trips," on the ground that said allegations set forth conclusions of the pleader only and if true are wholly irrelevant and immaterial and do not justify a holding that the fi. fa. in question did issue illegally or is proceeding illegally whether taken alone or in connection with other allegations of the affidavit.

D. Plaintiff demurs to the last sentence of the sixth paragraph of said affidavit reading as follows: "The tax act herein attacked discriminates in favor of private carriers and against contract and common carriers in violation of article 1, section 2, of the constitution of Georgia and also of the commerce clause of the fourteenth amendment to the Constitution of the United States," on the ground that said allegations set forth conclusions of law which are not supported by allegations of fact.

7

Plaintiff demurs to and moves to strike the ninth paragraph of said affidavit on the ground that the facts therein alleged, if true, are wholly irrelevant and immaterial and do not justify a holding on the part of the Court that the fi. fa. in question did issue illegally or is proceeding illegally, whether such allegations be taken alone or in connection with other allegations of the affidavit.

8

Plaintiff demurs to and moves to strike the tenth paragraph of the affidavit of illegality on the ground that the facts therein alleged, if true, are wholly irrelevant and immaterial, and, whether taken alone or in connection with other allegations of said affidavit, justify a holding that the fi. fa. in question did issue illegally or is proceeding illegally.

[fol. 24] 9

Plaintiff specially demurs to and moves to strike the eleventh paragraph of the affidavit on the ground that the

allegations therein made, if true, are irrelevant and immaterial, and do not, whether taken alone or in connection with other allegations of the affidavit, justify a holding that the fi. fa. in question did issue illegally or is proceeding illegally.

10

Plaintiff specially demurs to and moves to strike the twelfth paragraph of the affidavit on the ground that the facts therein alleged, if true, are wholly irrelevant and immaterial, and do not, whether taken alone or in connection with other allegations of the affidavit, legally justify a holding on the part of the Court that the fi. fa. in question did issue illegally or is proceeding illegally.

11

Plaintiff specially demurs to and moves to strike the thirteenth paragraph of the affidavit on the ground that the facts therein alleged, if true, are wholly irrelevant and immaterial and, whether taken alone or in connection with other allegations of the affidavit, do not justify a holding by the Court that the fi. fa. in question did issue illegally or is proceeding illegally.

12

Plaintiff specially demurs to and moves to strike the fourteenth paragraph of the affidavit on the ground that the allegations of fact as therein made are irrelevant and immaterial and whether taken alone or in connection with other allegations of the affidavit do not justify a holding by the Court that the fi. fa. in question did issue illegally or is proceeding illegally.

[fol. 25] 13

Plaintiff demurs to and moves to strike the fifteenth paragraph of the affidavit on the ground that the allegations of fact as therein made, if true, are irrelevant and immaterial and do not justify a holding that the fi. fa. in question did issue illegally or is proceeding illegally.

14

Plaintiff demurs to and moves to strike the sixteenth paragraph and particularly that portion thereof reading as

follows: "The defendant operates through counties which have little or practically no United States Post Roads in them, and in addition this defendant does not operate his trucks on any of the Rural Post Road," on the ground that the allegations of said paragraph and particularly that allegation quoted, if true, are irrelevant and immaterial and do not justify a holding that the fi. fa. in question did issue illegally or is proceeding illegally.

15

Plaintiff specially demurs to and moves to strike the seventeenth paragraph of the affidavit on the ground that the allegations therein made are irrelevant and immaterial and show no ground or reason for arresting the proceeding under the fi. fa. in question.

16

Plaintiff demurs to and moves to strike the eighteenth paragraph of the affidavit on the ground that the allegations of fact as therein made, if true, are irrelevant and immaterial and do not, whether taken alone or in connection with other allegations of the affidavit, disclose any cause or ground for holding that the fi. fa. in question did issue illegally or is proceeding illegally.

17

Plaintiff demurs to and moves to strike the nineteenth [fol. 26] paragraph of the affidavit on the ground that the allegations of fact as therein made, if true, are irrelevant and immaterial and do not disclose any ground or cause for holding that the fi. fa. in question did issue illegally or is proceeding illegally.

18

Plaintiff demurs to and moves to strike the twentieth paragraph of the affidavit including subdivisions A, B, C, D and E thereof on the ground that the allegations of said paragraph set forth only conclusions of law wholly unsupported by allegations of fact.

Wherefore, plaintiff in fi. fa. prays the judgment of the court on this its demurrer and that the Court adjudge that said affidavit of illegality is insufficient in law and sets

forth no defense and that the same be dismissed at the cost of the defendant in fi. fa.

M. J. Yeomans, Attorney General; D. M. Parker, Assistant Attorney General; O. H. Dukes, Assistant Attorney General, Attorneys for Plaintiff in Fi. Fa.

[File endorsement omitted.]

[fol. 27] In Superior Court of Fulton County

[Title omitted]

Amendments to Affidavit of Illegality—Filed October 1, 1937

Comes now Dixie Ohio Express Company, defendant in fi. fa. in the above styled proceeding and with leave of court first had and obtained, amends its affidavit of illegality heretofore filed as follows:

1

To amend paragraph 4 so that said paragraph shall read as follows:

"Under the Maintenance Tax Act approved March 30, 1937 (Georgia Laws, 1937, page 155), the Legislature classified the carriers in two groups (1) Known as those trucks or vehicles not used as a common or contract carrier for hire, and (2) Those vehicles used as common or contract carriers for hire and placed a graduated tax on each type vehicle based on what is termed manufacturers' rated capacity. Some of the taxes included therein are as follows:

Manufacturers' Rated Capacity	Not for Hire Carrier	Contract or Common Carrier for Hire
1 ton or less	$5.00	$10.00
1 ton	$10.00	$20.00
1½ ton	$15.00	$50.00
2 ton	$30.00	$75.00
2½ ton	$37.50	$100.00
3 ton	$45.00	$125.00
7 ton	$1125.00	$1250.00

Tags must also be purchased for trailers and the fee for them is graduated according to empty factory weight and the fee for not for hire carriers is correspondingly less than those for the for hire carriers. Neither tractors nor trailers [fol. 28] pay fees on the basis of actual weight."

2

To amend paragraph 6 of said affidavit to read as follows: "Under the Maintenance Tax Act of 1937 the tax for not for hire trucks is much less than the tax for trucks operated for hire. In addition, the graduated increase for the not for hire trucks is out of proportion with the graduated increase on the for hire trucks. There are 69,503 not for hire trucks operated over the highways of Georgia and there are only 2,943 trucks operated in Georgia as carriers for hire. Trucks operated as not for hire carriers travel more miles per year over the highways of Georgia than do the carriers for hire. No distinction is made as to carriers engaged in interstate or intrastate commerce, whether carriers for hire or carriers not for hire. Resident and non-resident carriers are equally taxed and licensed, whether they make one trip or one thousand trips. The tax act herein attacked discriminates in favor of not for hire carriers and against the for hire contract and common carriers in violation of article 1, section 2 of the Constitution of Georgia and also the commerce clause and the Fourteenth Amendment to the Constitution of the United States."

3

To amend the next to the last sentence of paragraph 10 to read: "Not for hire carriers are not required to pay this fee."

4

To amend paragraph 19 by adding to said paragraph the following: "For the same year the State of Georgia spent $11,127,258.38 for highway construction and maintenance and of this sum extended the Federal Government contributed $3,721,489.90."

[fol. 29] 5

To add a new paragraph, to be known as 19-A, to read as follows:

"The 1937 legislature of Georgia passed an act to create a Department of Public Safety for Georgia (Georgia Laws, 1937, page 322). This act provides for a State Highway Patrol in charge of various safety regulations upon the highways. In addition, this act requires a driver's license for chauffeurs operating vehicles for hire. The fee for this license is $2.00 for a period of two years. The proceeds of all fees obtained by the driver's licenses are to be used to defray the expenses of the Department of Public Safety."

6

To amend paragraph 20, sub-section (a) so that the same shall read as follows:

"Said tax discriminates against carriers for hire and in favor of carriers operating not for hire and the tax is so exhorbitant as to be confiscatory and as such is in violation of article 1, paragraphs 2 and 3 of the Constitution of Georgia, which read: 'Protection to person and property is the paramount duty of government, and shall be partial and complete.' Also: 'No person shall be deprived of life, liberty or property except by due process of law.'"

7

To amend sub-section (d) of paragraph 20 so that the same shall read as follows:

"Said tax lays an unequal burden on carriers for hire and discriminates against carriers for hire in favor of carriers not for hire in that the maintenance tax is far less for carriers not for hire than it is for the for hire carriers and for this reason the tax violates the equal protection clause of section 1 of the fourteenth amendment to the Constitution of the United States."

[fol. 30] 8

To amend sub-section (e) of paragraph 20 so that the same shall read as follows:

"Said maintenance tax is a tax for the use of the highways by the defendant in fi. fa., who is engaged exclusively in interstate commerce and as the act lays a different tax

on trucks operated not for hire who are engaged in interstate commerce than upon the identical type trucks operated by the defendant as a common carrier for hire, said tax discriminates in favor of the not hire carriers and against the common carriers for hire and therefore is an undue burden on interstate commerce in violation of the commerce clause of the Constitution of the United States."

Watkins, Grant & Watkins, Attorneys for Dixie Ohio Express Company.

[fol. 31] *Duly sworn to by Allan Watkins. Jurat omitted in printing.*

ORDER

The within amendment hereby allowed, subject to demurrer & obj.

This Oct. 1st, 1937.

Hugh M. Dorsey, Judge, Fulton Superior Court.

[File endorsement omitted.]

[fol. 32] IN SUPERIOR COURT OF FULTON COUNTY

[Title omitted]

DEMURRER TO AFFIDAVIT OF ILLEGALITY AS AMENDED—Filed November 5, 1937

An amendment to the affidavit of illegality originally filed by the defendant in the above stated case having been tendered and allowed, but subject to demurrer, comes now plaintiff in fi. fa. and demurs to said affidavit of illegality as amended on the grounds following, to-wit:

1

To the defendant's affidavit of illegality as amended, plaintiff in fi. fa. renews and insists upon each and every ground of demurrer taken and urged in its demurrer heretofore filed to the affidavit of illegality as originally filed, and whether taken and urged to the affidavit as a whole or separately to the several paragraphs thereof. The affidavit as amended sets out no valid or legal cause of illegality to the execution issued and levied, and sets out no such facts as constitute a legal defense thereto or show that the fi. fa. is proceeding illegally.

To the sixth paragraph of the affidavit of illegality as amended plaintiff renews its demurrer to said paragraph of the affidavit as originally filed and, in addition thereto, specially demurs to the said paragraph as amended on the grounds following to-wit:

(a) Plaintiff demurs to and moves to strike the first sentence of said paragraph as amended reading as follows: "Under the maintenance tax act of 1937 the tax for not for hire trucks is much less than the tax for trucks operated for hire," on the ground that said allegation sets forth only a conclusion of the pleader and on the further ground that [fol. 33] the allegation as made, if true, is irrelevant and immaterial, and whether taken alone or in connection with other allegations, does not justify a holding that the execution in question did issue illegally or is proceeding illegally.

(b) Plaintiff demurs to the second sentence of said paragraph as amended, reading as follows: "In addition, the graduated increase for the not for hire trucks is out of proportion with the graduated increase on the for hire trucks," on the ground that said allegation sets forth a conclusion of the pleader only, and, if true, is irrelevant and immaterial and does not justify a holding that said fi. fa. did issue illegally or is proceeding illegally.

(c) Plaintiff demurs to and moves to strike that portion of the sixth paragraph of the affidavit as amended, reading as follows: "There are 69,503 not for hire trucks operated over the highways of Georgia and there are only 2,943 trucks operated in Georgia as carriers for hire. Trucks operated as not for hire carriers travel more miles per year over the highways of Georgia than do the carriers for hire. No distinction is made as to carriers engaged in interstate or intrastate commerce, whether carriers for hire or carriers not for hire. Resident and non-resident carriers are equally taxed and licensed, whether they make one trip or one thousand trips," on the ground that said allegations set forth conclusions of the pleader only and on the ground that said allegations as made, if true, are irrelevant and immaterial and do not justify holding that the fi. fa. in question did issue illegally or is proceeding illegally.

(d) Plaintiff demurs to the last sentence of the sixth paragraph of the affidavit as amended, reading as follows: "The

tax act herein attacked discriminates in favor of the not for hire carriers and against the for hire contract and common carriers in violation of Article I, section II of the Constitu- [fol. 34] tion of Georgia and also the commerce clause and the Fourteenth Amendment to the Constitution of the United States," on the ground that said allegations set forth conclusions of law not supported by any allegations of fact.

3

Plaintiff demurs to and moves to strike the tenth paragraph of the affidavit of illegality as amended on the ground that the facts therein alleged, if true, are wholly irrelevant and immaterial, and whether taken alone or in connection with other allegations of said affidavit, do not justify a holding that the fi. fa. in question did issue illegally or is proceeding illegally.

4

Plaintiff demurs to and moves to strike the nineteenth paragraph of the affidavit of illegality as amended, on the ground that the allegations of fact therein made, if true, are irrelevant and immaterial and do not justify a holding or judgment to the effect that the fi. fa. in question did issue illegally or is proceeding illegally.

5

Plaintiff demurs to and moves to strike the paragraph of the affidavit of illegality as amended, designated 19-a, on the ground that the allegations as therein made, if true, are irrelevant and immaterial and do not justify a holding or judgment to the effect that the fi. fa. in question did issue illegally or is proceeding illegally. Besides, it clearly appears from the allegations as made in said paragraph and as well from the Act as a whole, of which the court will take judicial cognizance, that the license fee required to be paid under said act is not assessed against or chargeable to the defendant.

6

Plaintiff demurs to and moves to strike the twentieth paragraph of the affidavit as amended, including subdivisions (a), (b), (c), (d) and (e) thereof as amended, on [fols. 35-45] the ground that the allegations of said paragraph set forth only conclusions of law unsupported by allegations of fact.

Wherefore, plaintiff in fi. fa. prays the judgment of the court on its original demurrer and its renewal demurrer and that the affidavit of illegality, as amended, be stricken and that the fi. fa. proceed.

M. J. Yeomans, Attorney General; Dave M. Parker, Assistant Attorney General; O. H. Dukes, Assistant Attorney General, Attorneys for Plaintiff in fi. fa. State Revenue Commission.

[File endorsement omitted.]

IN SUPERIOR COURT OF FULTON COUNTY

ORDER SUSTAINING DEMURRER

The within general demurrer to the affidavit of illegality as amended is hereby sustained and the petition ordered dismissed. The special demurrers are not passed upon.

Dec. 2, 1937.

Virlyn B. Moore, Judge, S. C. A. C.

[fol. 46] IN SUPREME COURT OF GEORGIA

No. 12230

DIXIE-OHIO EXPRESS COMPANY

v.

STATE REVENUE COMMISSION et al.

OPINION—June 17, 1938

By the COURT:

1. The maintenance-tax act of 1937 (Ga. L. 1937, pp. 155-167) is not void on the ground that it violates the equal-protection clause, or the due-process clause as embodied in article 1, section 1, par. 2, 3, of the constitution of this State. Code, §§ 2-102, 2-103.

2. Neither is said act violative of the commerce clause as embodied in article 1, section 8, paragraph 3, of the Constitution of the United States. Code, § 1-125.

3. Nor is said act violative of section 1 of the 14th amendment of the constitution of the United States inhibiting the passage of laws abridging the privileges or immunities of citizens. Code, § 1-815.

The State Revenue Commission of Georgia issued a fi. fa. against Dixie-Ohio Express Company and caused the same to be levied by a sheriff of Fulton County on property of the company. The fi. fa. was issued for the amount of a license fee or a maintenance tax alleged to be due by the Dixie Ohio Express Company, under the maintenance-tax act of 1937, for a truck operated by that company over certain highways of Georgia. After levy the defendant in fi. fa. filed with the sheriff an affidavit of illegality, and gave bond for the eventual condemnation-money. A gen- [fol. 47] eral demurrer to this affidavit was filed by the State Revenue Commission, and after hearing the court sustained the demurrer and dismissed the affidavit. To this ruling the defendant excepted. The affidavit of illegality alleges that the levy is proceeding illegally against the defendant in fi. fa. because the 1937 maintenance-tax act which authorized the tax is unconstitutional, in that it violates the provisions of both the State and Federal constitutions.

Briefly stated, the affidavit contains the following allegations: The Express Company is an Ohio corporation with its principal office and place of business in that State. It is engaged in the business of transporting property by motor vehicle as a common carrier for hire between the States of Ohio, Pennsylvania, New York, Kentucky, Tennessee, Alabama, and Georgia. It is engaged entirely in interstate commerce, and does no intrastate commerce whatever. It hauled commodities generally from places and points in Ohio to places in Georgia, and picked up freight in Georgia destined for the States north of Georgia. In operating over the highways of Georgia its trucks did not travel over any of the rural post roads of Georgia, as defined in the act of March 18, 1937, with respect to rural post roads; its trucks operated only over State-aid highways, mostly from Tennessee-Alabama line near Chattanooga to Atlanta; a permit issued to it by the Interstate Commerce Commission limited its operations over these highways; and under the Federal motor-carrier act of 1935 it could not operate over the rural post roads of Georgia. It owned approximately one hundred pieces of equipment, consisting of one and a half-

ton and two-ton straight trucks, and one and one-half-ton and two-ton tractors which were used to pull trailers weighing approximately 4,000 pounds; it purchased a $3 license [fol. 48] tag for each truck, and a $25 Georgia public-service tag for each truck, and purchased for each of its drivers a $2 chauffeur's license; and in addition to these taxes, it paid a tax of six cents per gallon for each gallon of gas purchased in the State of Georgia, and its purchases amounted to approximately 90,000 gallons of gas per year. The maintenance-tax act provides a tax of $50 on trucks of a manufacturer's rated capacity of one and one half tons, $75 for a manufacturer's rated capacity of two tons in the event that the trucks are operated as carriers for hire; and in the event they are operated as carriers not for hire, the corresponding fees would be $15 for a truck of a rated capacity of one and one half tons and $30 for a truck of a rated capacity of two tons.

It was further alleged that trailers are required to pay a fee graduated according to their empty factory weight, as set out in the maintenance-tax act of 1937; that the manufacturer's rated capacity and empty factory weight had no relationship to the actual weight of the vehicle and no relationship with respect to the use such vehicle would make of the highways of Georgia, because a truck of a rated capacity of one ton may weigh far in excess of a truck of a rated capacity of two or three tons, for rated capacity differs greatly from loaded capacity; that a combination of a tractor and trailer would pay a far greater fee than would a straight truck of approximately the same weight, even though the truck and trailer unit would cause less wear and tear on the highway than would the straight truck with a concentration of weight; that there was no relationship between the use made of the highway by these trucks and the tax levied, because there was a discrimination against carriers for hire in favor of carriers not for hire, for the fees of the latter are much less than the fees re- [fol. 49] quired of the former; that there were 69,503 carriers operating over the highways of Georgia as carriers not for hire, and only 2,943 trucks operated as carriers for hire; that the taxes already paid by the motor-vehicle industry more than paid the cost of maintaining and constructing the highways of the State over which the defendant in fi. fa. operates; that the State collected $1,305,999.71 from the

sale of the $3 tags, of which $1,209,495.05 was allocated to the State Highway Fund for State-aid roads, and the remainder was used for regulation purposes; that the Georgia Public-Service Commission collected $73,565 for registration fees, of which $28,341.12 was paid to the highway fund for State-aid roads, the remainder of which was used for regulation purposes; that the State collected $17,525,616.25 from gasoline tax; that for the same year the State of Georgia spent only $11,127,258.38 for highway construction, and of the sum expended the Federal Government contributed $3,721,489.90. Further, that only eleven per cent. of the entire mileage traveled by the defendant in fi. fa. is traveled within the boundaries of the State of Georgia, and the State collected far more than eleven per cent. of the total taxes paid by it to all of the other six States through which it operates; and that if it were required to pay the same amount of taxes in the other States, it would be unable to operate at a profit.

The Dixie-Ohio Express Company contends that the affidavit of illegality contained sufficient allegations to show that the levy of the fi. fa. was proceeding illegally, in that the tax sought to be collected was not due by the defendant in fi. fa., because the maintenance-tax act of 1937, under which the fi. fa. was issued, was void and unconstitutional; and therefore that the court erred in dismissing the affidavit. The legal questions presented are in the affidavit of illegality, and all the grounds of the affidavit are insisted on. These in summary are whether:

[fol. 50] (1) The maintenance-tax act of 1937, as applied to the plaintiff in error, is void in that it violates article 1, section 1, paragraphs 2 and 3, of the constitution of Georgia. (2) The tax is void in that it violates article 1, section 8, paragraph 3, of the Constitution of the United States. (3) The tax is void in that it violates section 1 of the fourteenth amendment to the Constitution of the United States.

GRICE, Justice:

The affidavit of illegality attacks as unconstitutional the motor-bus maintenance-tax act approved March 30, 1937 (Ga. Laws 1937, pp. 155-167). The act in question, by section 1, provides that "all persons, firms, corporations, or associations holding title to a motor-bus, truck and/or trailer, or having exclusive right to the use thereof for a

period of more than thirty days, shall pay a maintenance tax for the operation of such motor-bus, truck, and/or trailer upon and over the public roads of this State, according to the schedule" provided by the terms of the act. The maintenance tax is to be levied in addition to any and all other taxes, licenses, or registration fees required under existing laws. The terms of the act definitely identify the license or fee prescribed as a charge for the privilege of using the highways of the State. The entire amount of the tax collected under the provisions of the act is allocated for the construction and maintenance of public highways, to-wit, post roads. No provision is made to deduct any part thereof for the expense of collection or for any regulatory purpose. By section 2 of the act are given certain definitions of the scope of the act's operation, and in section 3 the schedule of license fees to be exacted is set out. There are three [fol. 51] classifications provided by this section: one is the license fee for the operation of passenger-carrying motor buses; another is the fee applicable to and exacted from persons operating non-passenger-carrying motor vehicles or trucks not used as common or contract carriers for hire; the third schedule applies to non-passenger-carrying motor vehicles or trucks used as common or contract carriers for hire. The license fees prescribed are different under each of these classifications. There is also a classification applying to trailers or semi-trailers, and in each main classification above referred to the trucks or buses are classified according to weight or manufacturer's rated capacity and the tax fixed according to a graduated scale; that is to say, the larger or heavier or the greater the rated carrying capacity of the t k or bus, the larger the amount of tax exacted. The st ate does not undertake to make any difference or distinction between the fees or charges applicable to persons operating interstate from those applicable to persons operating intrastate. The fee is the same without reference to whether the operations are interstate or intrastate.

1. The first insistence of the plaintiff in error is that the General Assembly could not, consistently with constitutional provision, provide for one class of carriers for hire, and another class of carriers not for hire, and charge different amounts for the two classes; and that accordingly the act discriminates against Dixie-Ohio Express Company, a common carrier of property for hire, in favor of private car-

riers of property. A State through its General Assembly may make classifications of subjects for taxation. The only constitutional requirement is that in so doing the classification so made shall have some rational basis. In Wright v. [fol. 52] Hirsch, 155 Ga. 227, 236 (116 S. E. 795), this court discussed very fully this question, and, speaking through Mr. Justice Hines, said: "The power of the legislature to classify persons for the purpose of imposing occupation taxes is undisputed. The provisions of the constitution with which we are dealing clearly recognize this power of classification. The power to classify necessarily includes the power to sub-classify. The legislature does not exhaust its power in this matter when it puts dealers of a particular kind in one class. It can place grocers in a class by themselves. It can put cigar dealers in a class by themselves. It can do the same thing with any other class of merchants. It can then sub-divide these classes into wholesale and retail dealers, and put a higher tax upon the former than upon the latter. Cook v. Marshall County, 196 U. S. 261 (25 Sup. Ct. 233, 49 L. ed. 471). In framing tax acts it has long been the custom of the legislature to divide merchants into wholesale and retail, and to place a higher occupation tax upon the former than upon the latter. This power of subclassification has been expressly declared to exist, by this court." On the question as to the scope of the power of a legislature to make classifications of businesses or subjects as a basis for a difference in treatment for tax purposes, see also: Johnston v. Macon, 62 Ga. 645; Davis v. Macon, 64 Ga. 128 (37 Am. R. 60); Goodwin v. Savannah, 53 Ga. 410; Singer Mfg. Co. v. Wright, 97 Ga. 114, 118 (25 S. E. 249, 35 L. R. A. 497); Sawtell v. Atlanta, 138 Ga. 687 (75 S. E. 982); Hazleton v. Atlanta, 144 Ga. 775 (87 S. E. 1043); Price v. Richardson, 159 Ga. 299 (125 S. E. 449); Hunter v. Wright, 169 Ga. 840 (152 S. E. 61); Adams Motor Co. v. Cler, 149 Ga. 818 (102 S. E. 440); Featherstone v. Norman, 170 Ga. 370, 386 (153 S. E. 58, 79 A. L. R. 449); Southern Transfer Co. v. Harrison, 171 Ga. 358 (155 S. E. 338); Hoffman v. Harrison, 171 Ga. 792 (156 S. E. 685); [fol. 53] Guerry v. Harrison, 178 Ga. 669; Milliron v. Harrison, 175 Ga. 764 (166 S. E. 231, 84 A. L. R. 1142); Coy v. Linder, 183 Ga. 583 (189 S. E. 26).

In the recent case of Carmichael v. Southern Coal &c. Co., 301 U. S. 495-531 (57 Sup. Ct. 868, 81 L. ed. 1245), the Supreme Court of the United States discussed at length

the power of a State or legislative body to make classifications of property for purposes of taxation. Involved in that case was the question of the constitutionality of the unemployment-insurance compensation act of Alabama; and it was contended that the act in question consfituted an infringement of the due-process and equal-protection clauses, on the ground that there were exempted from the provisions of the act agricultural laborers, domestic servants, employees of charitable institutions and interstate railways, etc. In other words, the basis of the constitutional attack was an alleged discrimination. Answering the contention made, the court, through Mr. Justice Stone, said: "It is inherent in the exercise of the power to tax that a State be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal-protection imposes upon a State any rigid rule of equality of taxation [citing cases]. This court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation [citing cases]. Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts that would support it." (Citing cases.) The court further said: "This restriction upon the judicial function, in passing on the con- [fol. 54] stitutionality of a statute, is not artificial or irrational. A State legislature, in the enactment of laws, has the widest possible latitude within the limitations of the constitution. In the nature of the case it can not record a complete catalog of the considerations which move its members to enact laws. In the absence of such a record courts can not assume that its action is capricious, or that, with its informed acquaintance with the local condition, to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."

For other rulings on this same general subject by the Supreme Court of the United States, see Carley v. Snook,

281 U. S. 66 (50 Sup. Ct. 204, 74 L. ed. 705); Aero Mayflower Transit Co. v. Georgia Public-Service Commission, 295 U. S. 285 (55 Sup. Ct. 709, 79 L. ed. 1439); Continental Baking Co. v. Woodring, 286 U. S. 352 (52 Sup. Ct. 595, 76 L. ed. 1155); Clark v. Poor, 274 U. S. 554 (47 Sup. Ct. 702, 71 L. ed. 1199); Morf. v. Bingham, 298 U. S. 407, 412 (56 Sup. Ct. 756, 80 L. ed. 1245). We think that the General Assembly can, for the purpose of taxation of this character, make classifications of carriers by truck, and make as one class those operating for hire either as contract or common carriers and the other as carriers not for hire. A rational basis for such classification readily appears. The carrier not for hire transports over the highways his own goods or property. He uses the highways only as the circumstances and exigencies of his own business require. His use of the highways is incidental only, while the carrier for hire operates over the highways transporting property of others, and charges compensation therefor. He makes the highways his place of business, and the natural tend- [fol. 55] ency will of course be for him to use the highways more, truck for truck, than does the carrier not for hire. In many cases courts of last resort have held that the classification is justified; that the lawmaking body may tax the common carrier for hire using the highways and exempt altogether the carrier not for hire. Like classifications for similar purposes have been upheld by the courts generally. In Bekins Van Lines v. Riley, 280 U. S. 80 (50 Sup. Ct. 64, 74 L. ed. 178), the Supreme Court of the United States was asked to strike down an amendment to the constitution of California, and statutes of that State laying upon common carriers engaged in transporting freight by motor vehicles for hire along public highways between fixed termini and over regular routes in California a tax upon their gross receipts, while other carriers were subjected to different and less burdensome taxation. The court held that there was no violation of the equal-protection clause, "since it cannot be said that the classification lacks any reasonable basis." In the opinion it was said: "Appellants voluntarily assumed the position of common carriers operating between fixed termini and enjoy all consequent benefits. That a marked distinction exists between common and private carriers by auto vehicles appears from Frost v. Railroad Commission, 271 U. S. 583 (46 Sup. Ct. 605, 70 L. ed.

1101), and Michigan Public Utilities Commission v. Duke, 266 U. S. 570 (45 Sup. Ct. 191, 69 L. ed. 445, 36 A. L. R. 1105). Sufficient reasons for placing common carriers, operating as appellants do, in a special class are pointed out by Raymond v. Holm, 165 Minn. 215 (206 N. W. 166); State v. LeFebvre, 174 Minn. 248 (219 N. W. 167); Iowa Motor Vehicle Asso. v. Railroad Com., 207 Iowa 461 (221 N. W. 364); Liberty Highway Co. v. Michigan Public Utilities Commission, 294 Fed. 703. Their use of the highways [fol. 56] probably will be regular and frequent, and therefore unusually destructive thereto. Also it will expose the public to dangers exceeding those consequent upon the occasional movements of other carriers." See also the annotations appended to the report of the case of Public-Service Commission of Wyoming v. Grimshaw, in 109 A. L. R. 534, 566 (49 Wyo. 158, 53 Pac. (2d) 1).

2. The maintenance-tax act is also criticized by plaintiff in error in that in each main classification, that is to say, the carriers for hire and the carriers not for hire, there is set up a subsclassification based on the manufacturer's rated capacity of the vehicles used, and fixing a different rate of tax according to the manufacturer's rated capacity, and that there is no relationship between the manufacturer's rated capacity of a truck or motor vehicle and its weight, and consequently no reasonable relationship between the manufacturer's rated capacity and the wear and tear that such vehicle will cause to the highways by its use. The affidavit of illegality recites that "Rated capacity denotes the power of the motor, and not the weight or carrying capacity of the body of the truck." Even so, it would seem that the manufacturer's rated capacity of a motor vehicle has a direct and natural relation to the propensities of the vehicle to injure the highway, and to create public hazards. To make a classification based on the horse-power of the motor is not an arbitrary classification. It was expressly so decided in Lee v. State, 163 Ga. 239, 242 (139 S. E. 912), in Hendrick v. Maryland, 235 U. S. 610 (35 Sup. Ct. 140, 59 L. ed. 385), and in Kane v. New Jersey, 242 U. S. 160, 167 (37 Sup. Ct. 30, 61 L. ed. 222). See also Hicklin v. Coney, 290 U. S. 169 (54 Sup. Ct. 142, 78 L. ed. 247); Carley v. Snook, supra.

[fol. 57] 3. Still another ground of attack is that the tax collected is not used on the highways over which the plaintiff

in error operates its trucks, but under the terms of the act it is allocated to rural post roads; that it is impossible for it to use the rural post roads of Georgia, because its routes within this State have been limited by the certificate granted it by the Interstate-Commerce Commission pursuant to the Federal motor-carrier act of 1935. U. S. C. A. title 49, §§ 301, 306. However, the privilege granted the carrier by the maintenance-tax act of 1937 here under attack is unlimited. Under it, the carrier, provided it complies with other requirements of law as to license fee, etc., may use every road in the system, including those to the maintenance of which the tax here challenged is allocated, to wit, those roads, to use the words of the statute, in the "United States rural post-roads division of the State highway of Georgia." In Aero Mayflower Transit Co. v. Georgia Public Service Commission, supra, it was said: "One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may." The decision in Clark v. Poor, supra, dealt with an Ohio statute, and is in point here. It was there held: "A State regulation providing that, before operating over the State highways, a common carrier by motor shall apply for and obtain a certificate or permit therefor from a State commission, and shall pay an extra tax for the maintenance and repair of the highways and for the administration and enforcement of the laws governing their use, is constitutional though applied to carriers engaged exclusively in interstate commerce. • • • That the tax so exacted is not all used for maintenance and repair of the highways, but some of it for defraying expenses of the commission in administration and enforcement of the [fol. 58] act, and some for other purposes, is no concern of the taxpayer, it being assessed for a proper purpose and not unreasonable in amount." In the opinion it was said: "The plaintiffs claim, as applied to them, the act violates the commerce clause of the Federal constitution. They insist, that, as they are engaged exclusively in interstate commerce, they are not subject to regulation by the State; that it is without power to require that before using its highways they apply for and obtain a certificate; and that it is also without power to impose, in addition to the annual license fee demanded of all persons using automobiles on the highways, a tax upon them, under § 614-94, for the maintenance and repair of the highways and for the administration and enforcement of the laws governing the use of the

same. The contrary is settled. The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the State to insure safety and convenience and the conservation of the highways [citing Morris v. Duby, 274 U. S. 135 (47 Sup. Ct. 548, 71 L. ed. 966); Hess v. Pawloski, 274 U. S. 352 (47 Sup. Ct. 632, 71 L. ed. 1091)]. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use [citing Hendrick v. Maryland, Kane v. New Jersey, supra]. Compare Packard v. Banton, 264 U. S. 140, 144," (44 Sup. Ct. 257, 68 L. ed. 596). One of the grounds of attack in the case just referred to, it is to be noted, was that not all of the tax was used for the maintenance and repair of the highways; that some of it was used for defraying the expense of the commission in the administration and enforcement of the act, and some for other purposes. The court said: "Since [fol. 59] the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs."

The plaintiff in error relies on Interstate Transit Inc. v. Lindsey, 283 U. S. 183 (51 Sup. Ct. 380, 75 L. ed. 953); but it was distinctly ruled in that case that "A detailed examination of the statute under which the tax here challenged was laid makes it clear that the charge was imposed, not as a compensation for the use of the highways, but for the privilege of doing the interstate bus business." In the opinion it was said: "While a State may not lay a tax on the privilege of engaging in interstate commerce (Sprout v. South Bend, 277 U. S. 163 (48 Sup. Ct. 502, 72 L. ed. 833), it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and regulating the traffic thereon [citing Kane v. New Jersey, Clark v. Poor, Sprout v. South Bend, supra]. As such a charge is a direct burden on interstate commerce, the tax can not be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expenses of regulating motor traffic. This may be indicated by the nature of the imposi-

tion, such as a mileage tax directly proportioned to the use (Interstate Busses Corp. v. Blodgett, 276 U. S. 245 [48 Sup. Ct. 230, 72 L. ed. 551]), or by the express allocation of the proceeds of the tax to highway purposes, as in Clark v. Poor, supra, or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. Hendrick v. Maryland [fol. 60] [supra]; Interstate Busses Corp. v. Holyoke Street Ry., 273 U. S. 45, 51 [47 Sup. Ct. 298, 71 L. ed. 530]." See also Aero Mayflower Transit Co. v. Georgia Public Service Com., 179 Ga. 431 (176 S. E. 487), s. c. 295 U. S. 185, supra.

4. It follows that the maintenance-tax act approved March 30, 1937 (Ga. L. 1937, p. 155), is not violative of article 1, section 1, paragraphs 2 and 3, of the constitution of this State, which declare that "Protection to person and property is the paramount duty of government, and shall be impartial and complete," and "No person shall be deprived of life, liberty, or property, except by due process of law;" or of article 1, section 8, paragraph 3 of the constitution of the United States, which provides that "The Congress shall have power * * * to regulate commerce with foreign nations and among the several States and with the Indian tribes;" or of the due-process clause of the 14th amendment of the constitution of the United States, which declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Judgment affirmed. All the Justices concur.

[fols. 61-64] IN SUPREME COURT OF GEORGIA

12230

DIXIE-OHIO EXPRESS CO.

v.

STATE REVENUE COMMISSION et al.

JUDGMENT—June 17, 1938

This case came before this court upon a writ of error from the superior court of Fulton county; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

[fol. 65] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR—Filed July 20, 1938

The petitioner, Dixie Ohio Express Company, assigns the following errors in the record and proceedings in this cause:

1

The Supreme Court of the State of Georgia erred in not holding the statute involved herein unconstitutional as being repugnant to the commerce clause of the Constitution of the United States, the facts showing that the appellant herein is a non-resident of Georgia, operating motor vehicles as a common carrier for hire exclusively in interstate commerce over the State highways of Georgia and the statute involved levies a tax on the appellant, the proceeds of which are used entirely for the maintenance of post roads which appellant does not and cannot use.

2

The Supreme Court of Georgia erred in not holding the statute involved herein unconstitutional as being repugnant to the commerce clause of the Constitution of the United States, the facts showing that the statute involved levied a tax for the purpose of maintaining certain high-

ways and the amount of the tax was graduated according to the manufacturer's rated capacity of trucks and the [fol. 66] tory weight of trailers, and was made applicable to the appellant, a common carrier for hire operating both types of vehicle exclusively in interstate commerce.

3

The Supreme Court of Georgia erred in not holding the statute involved herein unconstitutional as being repugnant to the commerce clause of the Constitution of the United States, the facts showing that exclusive of the maintenance tax involved herein that the appellant, a common carrier for hire engaged exclusively in interstate commerce, has paid two other license fees for all vehicles, operated in the State of Georgia and in addition has paid gasoline taxes, the combined total of which was more than sufficient to pay its proportionate share of the expenses of motor vehicle regulation and for its use of the highways.

4

The Supreme Court of Georgia erred in not holding the statute herein involved unconstitutional as being repugnant to the commerce clause of the Constitution of the United States, the facts showing that the statute required a much higher tax on vehicles of the appellant, who operated as a common carrier for hire exclusively in interstate commerce, than was required of identical vehicles not operated for hire, even though there are more than twenty times as many carriers operating not for hire as there are carriers operating for hire on the highways of the State of Georgia. In addition, the facts show that appellant is required to pay other fees that are not exacted of carriers operating for hire.

5

The Supreme Court of Georgia erred in not holding the statute herein involved unconstitutional as being repugnant to the equal protection clause of the fourteenth amendment to the Constitution of the United States, the facts [fol. 67] showing that the statute required a much higher tax on vehicles of the appellant, who operated as a common carrier for hire exclusively in interstate commerce, than was required of identical vehicles not operated for hire, even though there are more than twenty times as many car-

riers operating not for hire as there are carriers operating for hire on the highways of the State of Georgia. In addition, the facts show that appellant is required to pay other fees that are not exacted of carriers operating not for hire.

Wherefore, on account of the errors hereinbefore assigned, petitioner prays that said judgment of the Supreme Court of the State of Georgia, dated the 17th day of June, 1938, in the above entitled cause, be reversed and judgment entered in favor of this appellant.

This 19th day of July, 1938.

Edgar Watkins, Allan Watkins, Attorneys for the Appellant.

Post Office Address: 1025 Citizens & Southern National Bank Building, Atlanta, Georgia.

[File endorsement omitted.]

[fol. 68] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 20, 1938

The appellant in the above entitled cause, having prayed for an allowance of an appeal in this cause to the Supreme Court of the United States and the judgment made and entered in the above entitled cause by the Supreme Court of the State of Georgia on the 17th day of June, 1938, and upon each and every part thereof and having presented and filed its petition for appeal, assignments of error and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided:

It is now ordered that an appeal be and is hereby allowed to the Supreme Court of the United States from the final judgment of the Supreme Court of Georgia dated the 17th day of June, 1938, as prayed in said petition and it is further ordered that the clerk of the Supreme Court of the State of Georgia shall, within forty (40) days from this date, make and transmit to the Supreme Court of the United States a true copy of the material parts of the record, which

shall be designated by praecipe or stipulation of the parties or their counsel herein.

It is further ordered that the said appellant shall give good and sufficient bond in the sum of fifty-six dollars and twenty-five — ($56.25) that said appellant shall prosecute [fols. 69-102] said appeal to effect and answer all costs if he fails to make his plea good and that said supersedeas bond, when filed and approved, shall stay sending down of the mandate herein and of all proceedings in this cause until the final disposition of this cause by the Supreme Court of the United States.

This 19th day of July, 1938.

Richard B. Russell, Chief Justice of the Supreme Court of the State of Georgia.

[File endorsement omitted.]

[fol. 103] In Supreme Court of the United States

Statement of the Points on Which Appellant Intends to Rely and Designation as to Printing Record—Filed August 8, 1938

Appellant in the above styled case intends to rely on the following points:

1. The statute attacked in this case is unconstitutional and void in that the same is repugnant to the commerce clause of the Constitution of the United States as the proceeds of the tax are used to maintain roads over which the appellant does not and can not use.

2. The statute attacked in this case is unconstitutional and void in that the same is repugnant to the commerce clause of the Constitution of the United States as the measure of the tax bears no reasonable relationship to the use made of the highways.

3. The statute attacked in this case is unconstitutional and void in that the same is repugnant to the commerce clause of the Constitution of the United States as the appellant herein has paid other motor vehicle fees, the total of which is sufficient to pay its share of the expenses of the motor vehicle regulation and for the use the appellant makes of the highways.

4. The statute attacked in this case is unconstitutional and void in that the same is repugnant to the commerce [fol. 104] clause of the Constitution of the United States in that the tax discriminates against carriers for hire in favor of carriers not for hire.

5. The statute attacked in this case is unconstitutional and void in that the same is repugnant to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in that the tax discriminates against carriers for hire and in favor of carriers not for hire.

The above is a summary of the assignments of error and reference to that assignment is here made.

Parts of the Record on Which Appellant Intends to Rely

1. The execution issued by the State Revenue Commission.
2. Original affidavit of illegality filed by appellant in Fulton Superior Court and the amendment thereto.
3. The judgment of the Superior Court of Fulton County.
4. The opinion of the Supreme Court of the State of Georgia.
5. The statement as to jurisdiction, excepting the opinion of the Supreme Court of Georgia attached thereto.
6. The order allowing the appeal to the Supreme Court of the United States.
7. The assignments of error filed by the appellant in this Court.
8. This statement.

Respectfully submitted, Edgar Watkins, Allan Watkins, Attorneys for Appellant.

Post Office Address: 1025 Citizens & Southern National Bank Building, Atlanta, Georgia.

[fol. 105] Service of the foregoing Statement is hereby acknowledged, copy received and all other service waived.

This 4th day of August, 1938.

M. J. Yeomans, Attorney-General of the State of Georgia; W. H. Duckworth, O. H. Dukes, Assistant Attorney-General of the State of Georgia, Attorneys for Appellee.

[fol. 105½] [File endorsement omitted.]

[fol. 106] IN SUPREME COURT OF THE UNITED STATES

DESIGNATION OF ADDITIONAL PARTS OF THE RECORD CONSIDERED MATERIAL BY APPELLEES—Filed August 10, 1938

Come now appellees within ten days after service of statement of points upon which appellant intends to rely and the parts of the record, deemed by it to be necessary for a consideration of the questions presented, and pursuant to paragraph 9 of rule 13, designate additional parts of the record in said case deemed by appellees to be material in consideration and determination of the question raised, to-wit:.

1. The original demurrer of the State Revenue Commission, et al., to the affidavit of illegality as filed by Dixie Ohio Express Company, appellant herein.

2. Second demurrer filed by State Revenue Commission, et al., after allowance of an amendment to the original affidavit of illegality as filed by Dixie Ohio Express Company and demurring to said affidavit of illegality as amended.

The parts and portions of the record designated in paragraphs 1 and 2 of this statement should be incorporated in the printed record.

Respectfully submitted, M. J. Yeomans, Attorney General of Georgia; W. H. Duckworth, Assistant Attorney General; O. H. Dukes, Assistant Attorney General, Attorneys for Appellees.

Post Office Address: 112 State Capitol, Atlanta, Ga.

[fol. 107] Service of the foregoing statement is hereby acknowledged, copy received and all other service waived.

This 8th day of August, A. D., 1938.

Edgar Watkins, Allan Watkins, Attorneys for Appellant.

[fol. 108] [File endorsement omitted.]

Endorsed on cover: File No. 42,745. Georgia Supreme Court. Term No. 260. Dixie Ohio Express Company, Appellant, vs. State Revenue Commission of Georgia et al. Filed August 8, 1938. Term No. 260, O. T., 1938.